

EXHIBIT D

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE
- - -

In Re: : Chapter 11
: :
: Case No.
W.R. GRACE & CO., et al, : 01-01139 JKF
: :
: (Jointly
Debtors : Administered)

- - -
Thursday, May 7, 2009
- - -

Oral deposition of GEORGE L.
PRIEST, taken pursuant to notice, was
held at the offices of DRINKER BIDDLE &
REATH, Two Logan Square, 18th & Cherry
Streets, Philadelphia, Pennsylvania
19103, commencing at 10:18 a.m., on the
above date, before Lori A. Zabielski, a
Registered Professional Reporter and
Notary Public in and for the Commonwealth
of Pennsylvania.

- - -
MAGNA LEGAL SERVICES
Seven Penn Center
1635 Market Street
8th Floor
Philadelphia, Pennsylvania 19103
866.624.6221

1 APPEARANCES:

2 DRINKER BIDDLE & REATH, LLP

3 BY: MICHAEL F. BROWN, ESQUIRE

4 One Logan Square

5 18th & Cherry Streets

6 Philadelphia, Pennsylvania 19103-6996

7 215.988.2988

8 (brownmf@dbb.com)

9 (jeffrey.boerger@dbb.com)

10 Representing OneBeacon America Insurance

11 Company, Seaton Insurance Company,

12 Government Employees Insurance Company,

13 Columbia Insurance Company f/k/a Republic

14 Insurance Company

15 CAPLIN & DRYSDALE, CHARTERED

16 BY: PETER VAN N. LOCKWOOD, ESQUIRE

17 One Thomas Circle N.W.

18 Suite 1100

19 Washington, DC 20005

20 202.862.7801

21 (pvn1@capdale.com)

22 Representing Grace, Official Committee of

23 Asbestos Personal Injury Claimants

24 ("ACC")

1 ANDERSON KILL & OLICK, P.C.

2 BY: ROBERT M. HORKOVICH, ESQUIRE*

3 (*VIA TELECONFERENCE)

4 1251 Avenue of the Americas

5 New York, New York 10020

6 212.278.1322

7 (rhorkovitz@andersonkill.com)

8 Representing the ACC

1 APPEARANCES (continued)

2 BILZIN SUMBERG BAENA PRICE & AXELROD, LLP

3 BY: JEFFREY I. SNYDER, ESQUIRE*

4 (*VIA TELECONFERENCE)

5 200 South Biscayne Boulevard

6 Suite 2500

7 Miami, Florida 33131-5340

8 305.375.6148

9 (jsnyder@bilzin.com)

10 Representing Property Damage Committee

11 STROOCK & STROOCK & LAVAN, LLP

12 BY: ARLENE G. KRIEGER, ESQUIRE*

13 (*VIA TELECONFERENCE)

14 180 Maiden Lane

15 New York, New York 10038-4982

16 212.806.5400

17 (akrieger@stroock.com)

18 Representing Official Committee of

19 Unsecured Creditors

20 STEVENS & LEE, P.C.

21 BY: MARNIE E. SIMON, ESQUIRE

22 1818 Market Street, 29th Floor

23 Philadelphia, Pennsylvania 19103-1702

24 215.751.2885

25 (mes@stevenslee.com)

26 Representing Fireman's Fund Insurance

27 ALAN B. RICH LAW OFFICES

28 BY: ALAN B. RICH, ESQUIRE

29 Elm Place, Suite 4620

30 1401 Elm Street

31 Dallas, Texas 75202

32 214.744.5100

33 (arich@alanrichlaw.com)

34 Representing Property Damage PCR

1 APPEARANCES (continued)

2 CAMPBELL & LEVINE, LLC

3 BY: MARK T. HURFORD, ESQUIRE*

4 (*VIA TELECONFERENCE)

5 800 North King Street, Suite 300

6 Wilmington, Delaware 19801

7 302.426.1900

8 (mhurford@camlev.com)

9 Representing Official Committee of

10 Asbestos Personal Injury Claimants

11 KIRKLAND & ELLIS, LLP

12 BY: LISA G. ESAYIAN, ESQUIRE

13 300 North LaSalle Street

14 Chicago, Illinois 60654

15 312.862.2226

16 (lisa.esayian@kirkland.com)

17 Representing the Debtors

18 SIMPSON THACHER & BARTLETT, LLP

19 BY: SAMUEL J. RUBIN, ESQUIRE*

20 (*VIA TELECONFERENCE)

21 425 Lexington Avenue

22 New York, New York 10017-3954

23 212.455.3122

24 (srubin@stblaw.com)

25 Representing Travelers Casualty and

26 Surety Company

27 FORD MARRIN ESPOSITO & WITMEYER & GLESER

28 BY: ELIZABETH M. DeCRISTOFARO, ESQUIRE*

29 (*VIA TELECONFERENCE)

30 Wall Street Plaza

31 New York, New York 10005-1875

32 212.269.4900

33 Representing Continental Casualty Company

34 and Continental Insurance Company

1 APPEARANCES (continued)

2 ECKERT SEAMANS CHERIN & MELLOTT, LLC

3 BY: LAURA G. STOVER, ESQUIRE

4 1747 Pennsylvania Avenue, NW

5 12th Floor

6 Washington, DC 20006

7 202.659.6619

8 (lstover@eckertseamans.com)

9 Representing Maryland Casualty and Zurich

10 WILEY REIN, LLP

11 BY: KARALEE C. MORELL, ESQUIRE*

12 (*VIA TELECONFERENCE)

13 1776 K Street NW

14 Washington, DC 20006

15 202.719.7520

16 (kmorell@wileyrein.com)

17 Representing Maryland Casualty and Zurich

18 COZEN O'CONNOR

19 BY: ILAN ROSENBERG, ESQUIRE*

20 (*VIA TELECONFERENCE)

21 1900 Market Street

22 Philadelphia, Pennsylvania 19103-3508

23 215.665.2147

24 (irosenberg@cozen.com)

25 Representing Federal Insurance Company

26 ORRICK HERRINGTON & SUTCLIFFE, LLP

27 BY: PERI N. MAHALEY, ESQUIRE

28 Columbia Center

29 1152 15th Street, N.W.

30 Washington, DC 20005-1706

31 202.339.8427

32 (pmahaley@orrlick.com)

33 Representing Future Claimants

34 Representative

3 (Pages 6 to 9)

Page 6

Page 8

1 APPEARANCES (continued)

2 CUYLER BURK, P.C.

3 BY: EDWARD V. COLLINS, ESQUIRE*

4 (*VIA TELECONFERENCE)

5 4 Century Drive

6 Parsippany, New Jersey 07054

7 973.734.3200

8 (ecollins@cuyler.com)

9 Representing Allstate Insurance Company

10 WILSON ELSEER MOSKOWITZ EDELMAN & DICKER,

11 LLP

12 BY: CARL PERNICONE, ESQUIRE*

13 (*VIA TELECONFERENCE)

14 150 East 42nd Street

15 New York, New York 10017-5639

16 212.915.5656

17 (carl.pernicone@wilsonelser.com)

18 Representing Arrowood Indemnity Company

19 GOODWIN PROCTER, LLP

20 BY: MICHAEL S. GIANNOTTO, ESQUIRE*

21 (*VIA TELECONFERENCE)

22 901 New York Avenue, N.W.

23 Washington, DC 20001

24 202.346.4124

(mgiannotto@goodwinprocter.com)

Representing CNA Insurance

KRAMER LEVIN NAFTALIS & FRANKEL, LLP

BY: GREGORY A. HOROWITZ, ESQUIRE*

(*VIA TELECONFERENCE)

1177 Avenue of the Americas

New York, New York 10036

212.715.9571

(ghorowitz@kramerlevin.com)

Representing Official Committee of Equity

Holders

1 ---
2 DEPOSITION SUPPORT INDEX
3 ---
4

5 Direction to Witness Not to Answer:

6 Page Line Page Line

7 NONE

8
9
10 Request for Production of Documents:

11 Page Line Page Line

12 NONE

13
14
15 Stipulations:

16 Page Line Page Line

17 09 02

18
19
20 Area(s) Marked Confidential:

21 Page Line Page Line

22 NONE
23
24

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Page 9

1 ---
2 INDEX
3 ---
4

5 Testimony of: GEORGE L. PRIEST

6 By Mr. Lockwood Page 09, 239

7 By Ms. Esayan Page 213

8 By Mr. Brown Page 233

9 By Mr. Pernicone Page 234

10
11
12 ---
13 EXHIBITS
14 ---

15 NO. DESCRIPTION PAGE

16 Priest-1 Exhibit Book to First

Amended Joint Plan of

17 Reorganization and

18 Disclosure Statement as

of February 27, 2009 09

19 Priest-2 Debtors' Disclosure

Statement for the First

20 Amended Joint Plan of

21 Reorganization under

Chapter 11... 09

22 Priest-3 Certain Insurers' Notice

of Filing of the Expert

23 Report of Professor

George L. Priest 09
24 ---1 ---
2
3 (It is hereby stipulated and
4 agreed by and among counsel for
5 the respective parties that the
6 filing, sealing and certification
7 of the deposition are waived; and
8 that all objections, except as to
9 the form of the question, will be
reserved until the time of trial.)
10 ---11 (Exhibits Priest-1, 2, and 3
12 premarked for identification.)
13 ---14 GEORGE L. PRIEST, after
15 having been first duly sworn, was
16 examined and testified as follows:
17 ---18 EXAMINATION
19 ---

20 BY MR. LOCKWOOD:

21 Q. Good morning, Professor
22 Priest.

23 A. Good morning.

24 Q. You have been deposed

6 (Pages 18 to 21)

Page 18

1 review transcripts after depositions, but
2 I just don't recall in terms of this
3 transcript. I could find an answer for
4 that in my office, but I don't know
5 myself.

6 **Q. So I take it, without**
7 **wasting all of your and our time by**
8 **reading through it, you have no**
9 **particular recollection of the testimony**
10 **that you gave that's embodied in that**
11 **transcript; is that fair?**

12 **A. Well, not exactly. As you**
13 **know, as I presume you know, I testified**
14 **in a number of cases involving**
15 **asbestos-related bankruptcies, and my**
16 **testimony has been pretty much the same**
17 **in all of them. So that I would be -- I**
18 **can't imagine there is anything that's**
19 **going to surprise me in this document.**
20 **But I am surprised that I didn't put it**
21 **in the list of testimony. That's the**
22 **best I can tell you. I do not believe**
23 **that the basic ideas are any different.**

1 **Q. Well, let me be more**

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1 **specific about what I am trying to do**
2 **here.**

3 **The report that you rendered**
4 **in the Federal-Mogul case, much of the**
5 **first half or two-thirds of it, contains**
6 **statements that are similar to or even**
7 **identical to statements that are**
8 **contained in your expert report in this**
9 **case. I am just representing that to**
10 **you. I am not asking you to agree or**
11 **not.**

12 **And, in general, that's the**
13 **portion of the report that discusses sort**
14 **of the non-Grace-specific portions of**
15 **what I will say the first half or so of**
16 **this report.**

17 **And what I was wanting to**
18 **ask you is whether or not you recalled**
19 **reading that transcript at any point and**
20 **saying to yourself that some answer that**
21 **you gave to a question that was asked of**
22 **you in that deposition was incorrect or**
23 **materially incomplete or in some manner**
24 **or another something that you felt that**

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1 **hadn't captured what you intended to say?**
2 **And if you don't remember, that's the**
3 **answer.**

4 **MR. BROWN: I believe he's**
5 **already answered that, while he**
6 **typically reviewed transcripts, he**
7 **couldn't state that he reviewed**
8 **this one.**

9 **MR. LOCKWOOD: I am pressing**
10 **him on this one question to see if**
11 **he remembers anything. If he**
12 **doesn't, he doesn't.**

13 **THE WITNESS: I really don't**
14 **recall any major change to a**
15 **deposition transcript in recent**
16 **times, but I can't precisely**
17 **recall the Federal-Mogul**
18 **deposition.**

19 **BY MR. LOCKWOOD:**

20 **Q. Okay. I am going to start**
21 **then on your expert report here and get**
22 **into some specifics, if that's okay.**

23 **Just to confirm some general**
24 **aspects of this report, in paragraph 18**

Page 21

1 **in the very first sentence, your report**
2 **states, quote, I have been asked to**
3 **address the economic effects and**
4 **implications of various features of the**
5 **First Amended Joint Plan of**
6 **Reorganization, et cetera.**

7 **Is it correct then that your**
8 **report is intended by you not to contain**
9 **any of opinions on legal matters as**
10 **opposed to economic matters?**

11 **A. Exactly. I have tried in**
12 **the report to make clear that the opinion**
13 **given here, presented here is an economic**
14 **opinion based upon my understanding of**
15 **custom and practice in the industry but**
16 **is it not in any respect a legal opinion.**
17 **And I hope throughout this deposition to**
18 **continue to maintain that distinction.**

19 **Q. So despite the fact that you**
20 **are a law professor and have a law**
21 **degree, you are not utilizing or**
22 **proffering that professional expertise as**
23 **a basis for any legal views that might be**
24 **deemed or considered or thought to be**

1 expressed in this report?

2 A. Correct. I believe there
3 are no legal opinions given here. I
4 meant to write a report that was based on
5 economics or custom and practice only.

6 **Q. Just for the record, what is**
7 **your economic training in the field of**
8 **economics?**

9 A. I attended the University of
10 Chicago Law School. I took economics
11 courses that were taught in the law
12 school, and I also audited economic
13 courses taught in the economics
14 department. I have studied the field of
15 economics extensively since then. That's
16 the basic training.

17 But it's been reflected in
18 publication and peer review economic
19 journals. I serve as a peer reviewer for
20 various economics journals. My title at
21 Yale is Professor of Law and Economics.
22 I don't teach in the economics
23 department, but I have an economics
24 background.

1 **Q. But you don't have an**
2 **advanced degree in the field of**
3 **economics; is that correct?**

4 A. That's correct.

5 **Q. And in paragraph 7 of your**
6 **report, you say you have held**
7 **appointments as a visiting professor in**
8 **the Department of Economics at the**
9 **University of Miami and the Department of**
10 **Economics, University of Toronto.**

11 Could you tell us what sort
12 of professorships those were in --
13 visiting professor, I take it, means that
14 it wasn't a permanent employment. But,
15 beyond that, in the Department of
16 Economics, you were teaching law in
17 economics or what were you doing in those
18 capacities?

19 A. A visiting professor is
20 basically someone brought in to teach a
21 course, one or more courses, and I taught
22 at the University of Miami in one of the
23 subdivisions of the Department of
24 Economics, courses on industrial

1 organization. I don't know if I taught
2 an insurance course or not. I taught
3 there for two or three summers. And I
4 know there was an industrial organization
5 course, which was mostly economics, but I
6 did discuss some antitrust cases. But it
7 was mostly economics. I may have taught
8 a course on the economics of tort law --
9 I am not sure -- at Miami sometime ago.

10 In the Department of
11 Economics of the University of Toronto, I
12 taught a course on general principles of
13 insurance with application to private
14 insurance and governmental insurance. It
15 was a course jointly listed in the
16 Department of Economics and the law
17 school.

18 **Q. With respect to the subject**
19 **of insurance, do you have any**
20 **professional degrees or licenses or**
21 **titles in that field?**

22 A. No, I don't. It's simply
23 been a subject of my study and research
24 for a long period of my career.

1 **Q. Would it be fair to say that**
2 **your involvement in the field of**
3 **insurance has been either principally or**
4 **exclusively -- and you tell us which --**
5 **from the perspective of an academic role?**

6 A. I would say yes with the --
7 certainly, all of my -- I am an academic,
8 and so all of my activities have been
9 basically academic in nature. On the
10 other hand, I have had, in my work in the
11 insurance field, various assignments at
12 one point or another that were more
13 practical. And they were academic,
14 though certainly I think my academic
15 training and research and study was
16 brought to bear on those tasks.

17 **Q. Well, just to be a little**
18 **bit more specific, have you ever worked**
19 **directly for an insurance company?**

20 A. I have worked as a
21 consultant for an insurance company. I
22 have not worked as an employee in a W-2
23 sense for an insurance company.

24 **Q. Have you worked, let's say,**

17 (Pages 62 to 65)

Page 62

1 paragraph 27 is meant to address primary
2 insurers who have a right and duty to
3 defend, because it includes the cause to
4 perform these functions, which refers to
5 the functions described in the previous
6 sentence.

7 Although, as you know, at
8 later points in the report, I present
9 this incentive point as it affects
10 umbrella and excess carriers who
11 typically would not have the right or
12 duty to perform the functions that I am
13 referring to in this paragraph.

14 **Q. Well, I am trying to figure**
15 **out -- and maybe you can help me with**
16 **this -- which sentences in paragraph 27**
17 **are limited to the duties, rights,**
18 **obligations of primary insurers and which**
19 **ones are intended to cover the rights,**
20 **obligations, duties of excess and**
21 **umbrella insurers.**

22 Because there is, certainly
23 in the last sentence, a reference to
! excess policies, and I had trouble,

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1 reading this, to know where you were
2 moving from describing primary coverage
3 to either all coverage or excess
4 coverage.

5 So could you look at that
6 paragraph and see if there is a dividing
7 line there?

8 A. No, there is not a dividing
9 line, because, again, this is not a legal
10 opinion and is not meant to address legal
11 claims. It's trying to explain economic
12 incentives and the economic structure.

13 So when I make the point
14 about -- I start with a reference to the
15 primary insurer that has a duty to defend
16 claims. I then state that the insurer is
17 in a superior -- this is to go on through
18 the paragraph -- the insurer, and here I
19 am referring to the primary insurer -- is
20 in the superior position to perform these
21 functions, meaning the functions of
22 controlling the defense because it must
23 ultimately pay the indemnity.

24 But that sentence itself

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1 refers to primary insurers who have a
2 right and duty to defend. But the point
3 about the superior position of an insurer
4 that must ultimately pay the indemnity
5 from its funds is a broader economic
6 point. I then go on to apply that
7 economic point more broadly.

8 **Q. Okay. So keeping in mind**
9 **that this expert report is being tendered**
10 **in the W.R. Grace bankruptcy case as**
11 **opposed to some sort of academic**
12 **exercise, if, in fact, W.R. Grace was**
13 **paying two-thirds of all indemnity costs**
14 **out of its own pocket as of the date it**
15 **entered bankruptcy, do any of two**
16 **sentences that you just referred to, the**
17 **third and fourth sentence of the**
18 **paragraph 27, have any application**
19 **whatsoever to W.R. Grace?**

20 A. Sure, because it has
21 application to W.R. Grace's policies.
22 What I am trying to do in this Section is
23 to explain the policies and the structure
24 of the policies.

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1 If, in fact, W.R. Grace was
2 able to enter agreements with its primary
3 carriers to take over -- I don't know how
4 it takes over two-thirds of the indemnity
5 as opposed to all of it, or whatever; I
6 don't know what those agreements are, and
7 I will take your hypothetical -- that's
8 great. The insurers agreed on some terms
9 to shift -- to concede the right and duty
10 to defend to Grace. That's fine. I am
11 not against settlement in any regard.

12 But the incentive question
13 is still applicable with regard, as you
14 asked me before, with regard to those
15 insurers who had not reached agreements
16 with Grace. And so I think there is -- I
17 think the paragraph, as it's written, is
18 analytically applicable to some set of
19 situations that we are trying to address
20 here.

21 **Q. So we are absolutely clear**
22 **on this, W.R. Grace -- let me rephrase**
23 **this.**

24 For the purpose of this

1 THE WITNESS: That's fine.

2 That wouldn't affect my answer.

3 BY MR. LOCKWOOD:

4 Q. Similarly, with respect to
5 paragraph 30 -- strike that.

6 You address a requirement of
7 insurer consent to assignment of policy
8 rights in paragraph 30 of your report,
9 correct?

10 A. I do.

11 Q. You are aware that the
12 extent of which that right which on its
13 face in the policy is asserted to be
14 absolute is, in fact, the subject of
15 varying state law decisions in
16 jurisdictions over the circumstances
17 under which assignments can be made by
18 insureds without the consent of insurers,
19 are you?

20 A. Yes, I am aware of that.

21 Q. So as to this paragraph, you
22 are simply -- let me ask it this way:
23 First, this paragraph is not intended by
24 you to contain legal opinions about the

1 extent to which these provisions in CGL
2 policies are or are not enforceable as a
3 matter of state law; is that correct?

4 A. Absolutely.

5 Q. And, indeed, this
6 discussion, as you have indicated
7 earlier, has to do with your views as to
8 the economic impact of the provision and
9 the perceived need for it to be
10 enforceable; is that correct?

11 A. I view the question of
12 enforceability as a legal question. What
13 I am trying to explain here is the
14 economic basis for the assignment of
15 responsibilities in the way that the
16 policy assigns them.

17 So it's economic analysis,
18 but I don't reach the question of what's
19 enforceable and what isn't enforceable.
20 That's a legal opinion. That would be
21 calling for a legal opinion.

22 Q. Well, you have a sentence in
23 here, the second sentence in paragraph 30
24 that talks about or states, quote,

1 Requiring insurer consent to assignment
2 ensures that the risks undertaken by the
3 insurer under the policy not be increased
4 by a policyholder's action without the
5 insurer's consent.

6 Have I read that correctly?

7 A. Yes, you have.

8 Q. What risks undertaken by the
9 insurer under the policy are you
10 referring to?

11 A. The risks of paying out
12 liability payments, the risk of paying
13 indemnity.

14 Q. So it's the risk to the
15 insurer as opposed to the risk to the
16 insured that you are discussing here?

17 A. Exactly. It says that, the
18 risks undertaken by the insurer, in the
19 sentence you read.

20 Q. Well, is it not true that
21 one of the purposes of CGL liability
22 policies is that the insured, in exchange
23 for the payment of a premium, is getting
24 the insurer to agree to, in effect,

1 assume the risks of the insured with
2 respect to whatever activities are
3 covered by that policy?

4 A. Yes.

5 Q. So, essentially, we have got
6 two kinds of risks: We have got the risk
7 to the insured that the insurer
8 undertakes to cover; and we have got the
9 risk to the insurer that the agreement to
10 cover the first set of risks will cause
11 the insurer to have to pay money.

12 Is that a fair breakdown of
13 the risks?

14 A. No, I don't think it's fair.

15 The first part -- I would
16 say the first part of your sentence was
17 fair. The risk, as I have it -- this is
18 not exact, but the risk to the policy
19 that had insurer has undertaken to cover.
20 That's the risk I am talking about.

21 So it's a risk to the
22 policy, although, which if it's covered,
23 becomes a risk to the insurer. It's the
24 same risk. It's not a different risk. I

30 (Pages 114 to 117)

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1 **Contracts Disputes in paragraph 38, I**
 2 **take it, notwithstanding that fact, that**
 3 **you are not in paragraph 38 testifying**
 4 **that as a matter of fact or insurance law**
 5 **the Grace Plan of Reorganization is**
 6 **collusion between Grace and the asbestos**
 7 **claimants representatives as that term is**
 8 **used in insurance law?**

9 A. I am not making a legal
 10 conclusion or drawing a legal conclusion
 11 at all.

12 I refer to this policyholder
 13 treatise because the prohibition of
 14 collusion between a policyholder and a
 15 claimant is not a specific term -- it has
 16 to be inferred from an insurance policy.
 17 It is not a specific term of the
 18 insurance policy, but it has been
 19 inferred universally by courts.

20 But I am not rendering a
 21 legal conclusion or attempting to render
 22 a legal conclusion here. That's for the
 23 court to decide.

4 **Q. Well, what is it about the**

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1 collusion in a legal sense is not for me
 2 to say. From an economic standpoint,
 3 that is contrary to the economic, what
 4 I -- the point of this entire report is
 5 that's contrary to the economic structure
 6 established by Grace's insurance policies
 7 and other CGL policies.

8 **Q. You said the involvement of**
 9 **the claimants with respect to the Plan in**
 10 **that answer. Do.**

11 You really mean the creation
 12 of the Trust and the funding of the Trust
 13 with various types of insurance rights?

14 In other words, what I am
 15 driving at is the Plan itself has all
 16 kinds of provisions in it, many of which
 17 have nothing to do with asbestos. I am
 18 trying to ask you whether there is some,
 19 other than sort of the particular
 20 subparts that you referred to in your
 21 previous answer with respect to the
 22 TDPs -- I am going to start over.

23 If the Plan didn't transfer
 24 insurance rights to the Trust, would it

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1 **Grace Reorganization Plan, if anything,**
 2 **that you regard from an economic point of**
 3 **view indicative of, quote, collusion,**
 4 **close quote?**

5 A. Well, basically, the Debtor
 6 in the Grace Plan has agreed to a Plan
 7 which places substantial control of the
 8 Plan in the hands of claimants and
 9 representatives of the claimants.

10 The claimants or their
 11 representatives are in the first position
 12 to name the trustees. Its explicit
 13 representatives of the claimants indeed,
 14 not only representatives but fiduciary by
 15 the terms of the Plan, fiduciaries of the
 16 claimants are appointed to the Trust
 17 Advisory Committee and, of course, the
 18 Futures Representative is a fiduciary of
 19 future claimants.

20 So that is an agreement and
 21 a method of distributing the resources
 22 that has been agreed to between Grace and
 23 the claimants. That's what I mean.

24 Now, whether that's

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1 **be your view that the creation of the**
 2 **Trust by itself was evidence by**
 3 **collusion?**

4 A. I am not quite sure what
 5 that means, but I would say, as I
 6 understand your question, the answer
 7 would be no.

8 Well, you know, I can't say.
 9 What happens to the -- if it doesn't
 10 transfer the insurance proceeds, what
 11 happens to the insurance? If they make
 12 no claim against the insurance, then I
 13 would say the collusion point is no
 14 important. If it's simply a settlement
 15 between -- let's say Grace has released
 16 all of its insurers through some process
 17 and has now entered an agreement with the
 18 claimants against it, that's not
 19 collusive in the economic sense that I am
 20 using it here.

21 The concept of collusion
 22 that I am addressing, although not a
 23 legal concept, is the reference to the
 24 interest of the policyholder, aligning